

Frankreichs Reichensteuer-Entscheidung: Sind gute Richter schlecht für die Demokratie?

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Just before the turn of the year, on December 29th, the French Constitutional Council [overturned the socialist government's 75% income-tax rate for the rich](#), a measure the new occupant of the Elysée Palace, François Hollande, had turned into an anti-rich symbol during his presidential campaign. This is not the first time a flagship campaign pledge of this sort is quashed by a constitutional court. But I would like to use the decision as an opportunity to discuss a question of broader significance for the legitimacy of judicial review in democratic regimes. For someone like me, who sees the [best rationale for granting independent courts the power to invalidate legislative enactments as resting on a form of output legitimacy](#), the ruling raises a somewhat counter-intuitive paradox. Namely, that good judicial technocrats might, by preventing the adoption of bad policies, undermine the deliberative quality of the democratic process.

Whether an income-tax rate of 75% for income over €1m (\$1.3 million) is not just bad for the rich but also for the welfare of the nation as a whole is debatable. Starting from the premise that, in a competitive economy, an individual's marginal contribution to wealth-creation equals her marginal income, distinguished economists have argued that the optimal tax rate for top-earners is [somewhere in the region of 70%](#). Yet policy analysts did not wait to see the world's fourth richest man, Bernard Arnault, along with movie-star Gerard Depardieu flee to Belgium – which with a marginal income-tax rate of 53% hardly qualifies as a tax haven – to worry about the signal the measure would send to investors and wealth-creators. In fact, there were early indications that many among Hollande's advisers and fellow politicians in the socialist coalition did not support the policy and anticipated that it would be reversed by a Constitutional Council largely staffed with ageing right-wing politicians.

Election Pandering

The promise to raise the tax rate for top-earners to 75% was made in February 2012, when as socialist candidate for the presidency François Hollande sought to boost his left-wing credentials against incumbent President Sarkozy, portrayed as “President of the rich”, and his communist-backed rival on the far-left, Jean-Luc Mélenchon. By then the Council's position on confiscatory taxation was already well established. Seemingly inspired by a German Federal Constitutional Court ruling [on asset taxation](#) (*Vermögensteuer*), [which bore the influence of the conservative Staatslehrer Paul Kirchhof](#), the Council had first spelled out its tax cap standard in 2005. Article 13 of the Declaration of the Right of Man provides that taxation “ought to be equally apportioned among all citizens in proportion to their means”. And the Council held that taxation would run afoul of Article 13 if it took on a “confiscatory nature” or were to subject “a certain category of taxpayers to an excessive burden given their capacity to pay taxes”. Reiterated on several occasions, this dictum was certainly known to Hollande's team of economic advisers when their man announced his pledge on the campaign trail. In fact, it was suggested both [during the presidential campaign](#) as well as [soon thereafter](#) that the precise reason candidate Hollande made his spectacular tax pledge was because he could trust the Constitutional Council the policy would never be implemented.

Last summer, reviewing a first batch of fiscal measures, the Constitutional Council hinted that the government would have to reintroduce a statutory tax cap in order to ensure that [new levies do not push the overall burden to confiscatory levels](#). So, for the Council's observers, the late December ruling hardly came as a surprise. The writing was on the wall, as it were. It could be objected that, in the end, the Council did not annul the 75% tax rate on the grounds of its confiscatory nature. Instead, it declared the measure in breach of the principle of fiscal equality between households. As the 75% tax would have applied to individuals rather than to households, a family in which

husband and wife made €999,000 each would have escaped the tax hike, while a family with a single earner making only a few thousand Euros more would not. Such difference of treatment between households, the Council ruled, could not pass constitutional muster. In principle, this would not rule out a new version of the tax levied on all households whose combined income exceeds €1m or more, should the government opt for a higher threshold. Yet the ruling suggests a revised version of the tax hike would stand little chance to make it into the statute book. First, it specifies that the Council reached its decision on the merits without considering “other grievances” against the tax, such as its possible “confiscatory nature”. So, even if it complied with the equality-between-household standard, the revised tax would still be vulnerable to a confiscatory challenge. Second, among the other proposed changes to the French tax code, the Council did rule a new 75 percent tax on complementary retirement pensions “confiscatory”.

Passing the Buck to Constitutional Judges

The most probable outcome is that the government will ditch the policy, using the decision of the Council as a convenient excuse. It is not the first time the Council “relieves” a President of an embarrassing campaign pledge. In 2007, [it struck down a tax rebate for new property-owners](#). A measure that Nicolas Sarkozy had championed in his successful bid for the presidency as a way of promoting “une nation de propriétaires”, but which would have resulted in an estimated €5 billion loss in tax revenue for the state. Some political scientists have noticed this pattern in which politicians are able to shift the blame for not fulfilling their campaign promises to the non-elected judges. In a recent paper published in the [American Political Science Review](#), Justin Fox (Yale Political Science) and Matthew Stephenson (Harvard Law School) have explored the normative implications of this phenomenon through formal modelling. Their analysis suggests that judicial review may sometimes exacerbate the pathologies of representative democracy by rescuing leaders from the consequences of unwise policies. Far from discouraging posturing, wise judges may, on the contrary, encourage electoral pandering. Their work offers a good starting point to understand what happened in France but also to reflect on the legitimacy of judicial review, not as it ought to function in some ideal world but as it operates in the less-than-perfect one we inhabit. Plausibly, in the absence of judicial review or if the Council had clearly signalled that it would not meddle in matters related to taxation, François Hollande might have refrained from promising voters a policy he didn’t himself regard as reasonable. Rather than a struggle in which the candidates seek to outdo each other in bashing bankers and millionaires, the election might then have been more about what policies France could afford to tackle its economic problems. Had the socialist candidate nonetheless made the promise but decided to drop it once in the presidential seat, he would have had to explain voters why.

Technocracy and Distrust

How to avoid this passing-the-buck effect without getting rid of judicial review altogether is an arduous problem. We may want to keep judicial review because we believe that the long-term perspective judges (along with independent central bankers and other non-elected technocrats) bring to policy-making does sometimes positively counterbalance the short-term perspective of politicians preoccupied with the electoral cycle. On the other hand, our commitment to democracy implies that we cannot accept that it undermines the process of public deliberation. Constitutional engineering has yet to design the mechanism that will allow us to get the one without the other.

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